AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901. 1902.

No 815. 93.

JOHN KELLEY, PLAINTIFF IN ERROR,

vs.

OLIVER F. RHOADS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WYOMING.

RECORD FILED MAY 7, 1901.
AGREED RECORD FILED JANUARY 24, 1902.

(18,145.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 315.

JOHN KELLEY, PLAINTIFF IN ERROR,

vs.

OLIVER F. RHOADS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WYOMING.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 3, 1902.

a In the Supreme Court of the United States.

JOHN KELLEY, Plaintiff in Error,
vs.
OLIVER F. RHOADS, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed by and between counsel for plaintiff in error and counsel for defendant in error in the above-entitled case, that the following portions of the record consisting of the petition in error, the citation, the writ of error, assignment of errors, the return of the writ of error, and the following portions of the transcript, the petition in error, the petition, answer and reply filed in the district court, the agreed statement of facts, the order and judgment of the district court, the opinion of the supreme court, the judgment of the supreme court, the motion for rehearing, the order overruling motion for rehearing and the certificate as to Federal question, are all the portions of the record necessary to be published for the use of the court in determining the questions involved in this case.

JOSIAH A. VAN ORSDEL,
Attorney for Plaintiff in Error.
WILLIS VAN DEVANTER,
W. R. STOLL,
Attorneys for Defendant in Error.

1 In the Supreme Court of the United States.

JOHN KELLEY, Plaintiff in Error,
vs.
OLIVER F. RHOADS, Defendant in Error.

Petition for Writ of Error.

To the Honorable Charles N. Potter, chief justice of the supreme court of the State of Wyoming:

Comes now John Kelley, plaintiff in error, by Van Orsdel and Burdick, his attorneys, and complains that — the record and proceedings, and also the rendition of the judgment in a suit between John Kelley, plaintiff in error, and Oliver F. Rhoads, defendant in error, in the supreme court of the State of Wyoming, the same being the highest court of the said State in which a decision in said suit could be had, and in which a final judgment was rendered against the said plaintiff in error on the 1st day of March, A. D. 1901, in said suit, wherein a right, privilege, exemption and immunity and certain rights, privileges exemptions and immunities are specially set up and claimed under and by virtue of that portion of section 8, article 1 of the Constitution of the United States which provides,

"Congress shall have power * * * to regulate commerce with foreign nations, and among the several States and with the Indian tribes," and the decision was against the right, privilege, exemption and immunity and the rights, privileges, exemptions and immunities specially set up and claimed, all of which appears in the records and proceedings in said suit, manifest error hath happened, to the great damage of said plaintiff.

2 Wherefore, plaintiff in error prays that a writ of error be allowed, as well as such other process as may cause the same to be corrected by the Supreme Court of the United States.

VAN ORSDEL AND BURDICK,
Attorneys for John Kelley, Plaintiff in Error.

Writ of error as prayed for allowed this 4th day of April, A. D. 1901.

CHARLES N. POTTER,
Chief Justice of the Supreme Court of the State of Wyoming.

In the Supreme Court of the United States.

JOHN KELLEY, Plaintiff in Error,
vs.
OLIVER F. RHOADS, Defendant in Error.

Citation.

The United States of America to Oliver F. Rhoads:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at the city of Washington on the 14th day of October, A. D. 1901, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Wyoming, wherein John Kelley is plaintiff in error,

3 and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error mentioned in the said writ of error, should not be corrected and justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4th day of April in the year of our Lord one thousand nine hundred and one.

CHARLES N. POTTER,
Chief Justice of the Supreme Court of the State of Wyoming.

I hereby acknowledge service of the within instrument this 4th day of April, A. D. 1901, the same having been served by Charles W. Burdick, one of the attorneys for the plaintiff in error.

WALTER R. STOLL,
Attorney for Defendant in Error.

UNITED STATES OF AMERICA, } ss:
State of Wyoming, County of Laramie, }

Charles W. Burdick, being duly sworn deposes and says that he is one of the attorneys of record for the plaintiff in error in the case of John Kelley, plaintiff in error, *vs.* Oliver F. Rhoads, defendant in error; that on the 4th day of April, A. D. 1901, at the city of Cheyenne, in the county of Laramie, in the State of Wyoming, he served the within and annexed citation upon Walter R. Stoll, attorney of record for Oliver F. Rhoads, defendant in error, by delivering a true copy of said citation to said Walter R. Stoll at his office in said city, county and State.

CHARLES W. BURDICK.

Subscribed in my presence and sworn to before me this 4th day of April A. D. 1901.

[SEAL.] A. E. JENKINS,
Notary Public.

4 In the Supreme Court of the United States.

JOHN KELLEY, Plaintiff in Error,
vs.
OLIVER F. RHOADS, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable justices of the supreme court of the State of Wyoming, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in said supreme court of the State of Wyoming, before you or some one of you, being the highest court of law or equity of said State in which a decision could be had in the suit between John Kelley and Oliver F. Rhoads, wherein was drawn in question the construction of a section of the Constitution of the United States, and wherein a right, privilege, exemption and immunity, and certain rights, exemptions and immunities were claimed under and by virtue of section 8, article 1 of the Constitution of the United States, and the decision was against the right, privilege, exemption and immunity and rights, privileges, exemptions and immunities specially set up or claimed under said section of the Constitution of the United States, manifest error hath happened to the great damage of the said John Kelly, as by his complaint appears, we, being willing that *an* error, if any hath been,
5 should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Wash-

ington on the 14th day of October, 1901, next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 4th day of April, in the year of our Lord one thousand nine hundred and one.

LOUIS G. KIRK,
Clerk of the United States Circuit Court for the District of Wyoming.

In the Supreme Court of the United States.

JOHN KELLEY, Plaintiff in Error,
vs.
OLIVER F. RHOADS, Defendant in Error.

Assignment of Errors.

Comes now the plaintiff in error in the above-entitled cause and assigns error in the decision and decree of the supreme court of the State of Wyoming in said cause as follows:

First. The court erred in finding that the property of plaintiff in error in this case was subject to taxation in the State of
6 Wyoming, for the reason that said property being in transit and being transported across the State of Wyoming from the then Territory of Utah to the State of Nebraska was interstate commerce, and therefore exempt from taxation in the State of Wyoming, under and by virtue of that portion of section 8, article 1 of the Constitution of the United States, which provides, "Congress shall have power * * * to regulate commerce with foreign nations, and among the several States and with the Indian tribes."

Second. The court erred in finding that the property of plaintiff in error in this action was subject to taxation under the provisions of chapter 61 of the Session Laws of Wyoming of the year 1895, or any other statute of the State of Wyoming, for the reason that said property was interstate commerce and said provisions of the laws of Wyoming in their application to the property in question in this case are invalid and repugnant to the Constitution of the United States, and the decision in this case was in favor of the validity of said statutes.

Third. That the court erred in finding that the State of Wyoming, or any county thereof, had power to tax or lay a burden upon the property of plaintiff in error herein, for the reason that Congress has exclusive power to regulate commerce among the several States and any attempt on the part of the State of Wyoming, by legislation or otherwise, to tax or lay a burden upon the property of plaintiff in error herein is the exercise of a power reserved by the United States and not granted to the several States, and is therefore unconstitutional.

Fourth. The court erred in finding that the property of plaintiff in error became identified and incorporated with the general mass of property in the State, and that said property obtained a situs therein.

Fifth. The court erred in finding that the controlling purpose of the plaintiff in error in bringing his sheep into Wyoming was for the purpose of grazing and not for the purpose of transportation.

7 Sixth. The court erred in finding that the property of plaintiff in error was not actually in transit until loaded on the cars at Pine Bluffs Station, Wyoming.

VAN ORSDEL AND BURDICK,
Attorneys for Plaintiff in Error.

Return of Writ of Error.

STATE OF WYOMING, *ss:*

In the Supreme Court.

In obedience to the mandate of the foregoing writ, I, Robert C. Morris, clerk of the supreme court of the State of Wyoming, do herewith transmit to the honorable, the Supreme Court of the United States a true and complete transcript of the record and proceedings had in the case of John Kelley, plaintiff in error, *vs.* Oliver F. Rhoads, defendant in error, as fully as the same remains on file and of record in my office.

I do also transmit herewith the original petition for writ of error to the Supreme Court of the United States, and the original allowance of said writ by the chief justice of the supreme court of the State of Wyoming and endorsed on said petition, and the original citation issued by the said chief justice as full and entire as the same were respectively filed and appear on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court *of* my office in the city of Cheyenne, this 4th day of April, A. D. 1901.

ROBT C. MORRIS,
[SEAL.] *Clerk of the Supreme Court of the State of Wyoming.*

8 In the Supreme Court of the State of Wyoming.

JOHN KELLEY, Plaintiff in Error,
vs.
OLIVER F. RHOADS, Defendant in Error.

Petition in Error.

Comes now the plaintiff in error, John Kelley, and complains of the defendant in error, Oliver F. Rhoads, for that on the 28th day of December, A. D. 1898, the district court of the first judicial district of the State of Wyoming sitting within and for the county of

Laramie, in said State, rendered judgment in favor of the said defendant in error upon the petition of the plaintiff, the answer of the defendant, and the agreed statement of facts submitted to the court by plaintiff and defendant in an action then pending in said court, wherein plaintiff in error was plaintiff and defendant in error was defendant, a transcript of the proceedings, including said final judgment is filed herewith, and plaintiff in error alleges that there is error in said proceedings and judgment in this, to wit:

First.

That the judgment of the court is not sustained by the evidence submitted in this case, for the following reasons, to wit:

1. The court erred in rendering judgment for the defendant and against the plaintiff, in failing to find from the agreed statement of facts submitted to the district court that the property of this plaintiff was the subject of interstate commerce, in transit from the State of Utah, across the State of Wyoming, to the State of Ne-
9 braska, and that said sheep, the property of the plaintiff, were not brought into the State of Wyoming for the purpose of being grazed, or of becoming identified with the property of the State of Wyoming, and that said property was not subject to taxation therein.

2. The court erred in rendering judgment for the defendant and against the plaintiff in failing to find that the practical effect of the enforcement of the provisions of chapter 61 of the Session Laws of Wyoming for the Year 1895 was to lay a burden upon interstate commerce and that such statute is for that reason unconstitutional.

3. The court erred in rendering judgment for the defendant and against the plaintiff, in failing to find that the practical effect of enforcing the provisions of chapter 61 of the Session Laws of Wyoming for the Year 1895, is to assess, levy and collect taxes without due process of law, and that said statute is for that reason unconstitutional.

Second.

That the said judgment of the district court, for the above reasons, is contrary to law.

Plaintiff in error therefore prays that the said judgment may be reversed and a new trial granted in said case, and for such other and further relief as justice may require.

VAN ORSDEL AND BURDICK,
Attorneys for Plaintiff in Error.

THE STATE OF WYOMING, } ss:
County of Laramie, }

J. A. Van Orsdel, being of lawful age, and first duly sworn according to law, on his oath deposes and says:

That he is a member of the firm of Van Orsdel and Burdick, attorneys for the plaintiff in error in the above-entitled case;
10 that he has read the above and foregoing petition in error

and knows the contents thereof, and that the facts therein stated are true as he verily believes.

J. A. VAN ORSDEL.

Subscribed in my presence and sworn to before me this 4th day of December, A. D. 1899.

[SEAL.] L. R. GILLETTE,
Notary Public.

My commission expires Oct. 20th, 1903.

11 THE STATE OF WYOMING, } ss:
County of Laramie, }

In the District Court, First Judicial District.

JOHN KELLEY, Plaintiff,
vs.
OLIVER F. RHOADS, Defendant.

Petition.

Comes now the above-named plaintiff, John Keiley, a resident and citizen of the State of Kansas, and for cause of action against the above-named defendant, Oliver F. Rhoads, alleges:

First. That the said Oliver F. Rhoads is and has been since the seventh day of January, A. D., 1895, the duly elected, qualified and acting county assessor of the county of Laramie, State of Wyoming;

Second. That the above-named plaintiff, John Kelley, was on or about the 29th day of October, A. D., 1895, the owner of a trail herd of sheep, divided into three bands, and altogether numbering ten thousand head, more or less, which herd of sheep the said plaintiff was on or about the 29th day of October, A. D. 1895, by his agent James M. Yeates, and by the assistance of other employees, driving and transporting through the State of Wyoming, from the then Territory of Utah, to the State of Nebraska.

Third. That the said herd of sheep was not driven into the State of Wyoming for the purpose of grazing, or for any other purpose than to be transported through the said State by the most direct and available routes, roads and trails, either by being driven along
12 the regularly traveled roads, trails and highways, or by being transported on railroad cars, from the then Territory of Utah, through the State of Wyoming, to the State of Nebraska.

Fourth. That said herd of sheep was in fact transported on hoof from the then Territory of Utah across the State of Wyoming, along regularly traveled roads, trails and highways, as rapidly as that method of transportation would admit of, to a point on the line of the Union Pacific Railway Company, more specifically known and described as Pine Bluffs Station, and situate in Laramie county, State of Wyoming, where said sheep were loaded into the cars of the said Union Pacific Railway Company and by the said company and its agents and employees, transported to the State of Nebraska.

Fifth. Plaintiff further alleges that said herd of sheep was not brought into the State of Wyoming for the purpose of being maintained permanently within said State, or longer than necessary to pass from the western to the eastern boundary as rapidly as said sheep could with safety travel, or for the purpose of becoming in any way whatever, identified with the property thereof, and that said herd of sheep has not, at any time or any way whatever, by the action of this plaintiff, his agents or otherwise, become in any way identified with the property of the said State or any county thereof.

Sixth. That before said herd of sheep, or any part thereof, were driven out of the then Territory of Utah, they were by the proper officers, of the several counties of said Territory of Utah in which said sheep at the time were ranging, duly and regularly assessed for taxation for the year A. D. 1895, and that in compliance with the assessment so made, the amount of the levy resulting therefrom was by the person or persons then owning said sheep, duly paid to the proper officers, as taxes thereon for the year A. D. 1895.

Seventh. That on or about the 29th day of October, A. D. 1895, while said herd of sheep in charge of the agent of the
13 plaintiff, one James M. Yeates, and his other employés, was in transit through the county of Laramie, State of Wyoming, above-named defendant, Oliver F. Rhoads, representing to plaintiff's agent, James M. Yeates, that he was the county assessor of Laramie county, Wyoming, and representing that as such assessor he was authorized by the laws of the State of Wyoming to assess, levy and collect tax for the county of Laramie for the year 1895, against plaintiff's said herd of sheep, and upon such representation by defendant, and acting under the guise of his office as county assessor aforesaid, but in truth and in fact without any authority of law whatever, the said defendant unlawfully demanded of said plaintiff's agent, James M. Yeates that he pay to the said defendant the sum of two hundred and fifty dollars, ($250.00), taxes unlawfully claimed by the said defendant to be due to the county of Laramie on the said sheep for the current year of 1895.

Eighth. That the said defendant, acting under the guise of his office as county assessor aforesaid, threatened that unless said plaintiff's agent, James M. Yeates, paid the amount of tax of two hundred and fifty dollars ($250.00) so unlawfully claimed by defendant to be due to the county of Laramie, that he, the said defendant, would seize the said herd of sheep, property of the plaintiff, and by distress and sale of so many thereof as might be necessary, proceed to collect the amount of the tax so unlawfully claimed by said defendant to be due upon said sheep from said plaintiff to the county of Laramie, State of Wyoming, for the year A. D. 1895.

Ninth. Plaintiff further alleges that upon the refusal of plaintiff's agent, James M. Yeates, to pay the amount of tax so unlawfully claimed by defendant to be due upon plaintiff's said band of sheep, the defendant by the unlawful use and exercise of the authority vested in him by virtue of his office as county assessor aforesaid, proceeded to take possession of the said sheep for the purpose of

selling a portion thereof to satisfy said unlawful claim for
14 taxes as aforesaid, whereupon said plaintiff's agent, James M. Yeates, while under duress and restraint, did, under protest, pay to said defendant the amount of the tax so illegally and unlawfully claimed to be due to the county of Laramie, State of Wyoming, to wit: two hundred and fifty dollars ($250.00).

Tenth. Plaintiff also alleges that the defendant had full knowledge of the fact, and was notified by plaintiff's agent that said herd of sheep was what is commonly known as a trail herd, having no situs in the State of Wyoming, or any county thereof.

Eleventh. That said defendant had full knowledge of the fact, and was so informed by plaintiff's agent, that said herd of sheep was not brought into the State of Wyoming, or any county thereof, for the purpose of being maintained therein, or in any way becoming identified with the property of said State, or the counties thereof.

Twelfth. That said defendant had full knowledge of the fact, and was so informed by plaintiff's agent, that said herd of sheep was not brought into the State of Wyoming, or any county thereof, for the purpose of grazing therein, but solely for the purpose of driving and transporting said sheep, in the regular course of commercial intercourse, across said State of Wyoming from the then Territory of Utah, to the State of Nebraska.

Thirteenth. Plaintiff further alleges that James M. Yeates, his agent, did, on plaintiff's behalf, protest to the defendant against paying said sum so unlawfully claimed to be due from plaintiff for taxes upon said sheep, in the amount of two hundred and fifty dollars ($250.00) or any other sum, and did then and there give notice to said defendant that said plaintiff or plaintiff's agent would sue him, the said defendant, for the recovery of the amount thereof, and would hold him, the said defendant, personally liable for the tax so unlawfully claimed to be due and collected, and for damages for any injury occurring to the said sheep of plaintiff, by reason of defendant's unwarranted and unlawful action.

15 Fourteenth. Plaintiff further alleges that at the time of the regular assessment of property for the purpose of taxation in the county of Laramie for the year 1895, plaintiff had no property of any kind whatever in the county of Laramie, nor in the State of Wyoming, and had not had any property therein at any time prior thereto.

Fifteenth. Plaintiff further alleges that at the time the assessment of property in the county of Laramie for the year 1895 was equalized by the board of equalization of the county of Laramie, said plaintiff had no notice of the time or place of the meeting of said board of equalization, as required by law, or that any assessment had been made against him for any purpose whatever, and that at the time of the said equalization, plaintiff had no property whatever within the State of Wyoming or the county of Laramie.

Sixteenth. Plaintiff further alleges that at the time the taxes for the current year 1895 were regularly and legally levied in the said county of Laramie, State of Wyoming, that plaintiff had no property

whatever within the said county of Laramie, State of Wyoming, subject to taxation.

Seventeenth. That the collection of the amount so claimed by defendant to be due for taxes, to wit: two hundred and fifty dollars ($250.00), made by said defendant as aforesaid, was and is illegal and without authority of law.

Eighteenth. That the plaintiff has demanded from the said Oliver F. Rhoads, the return to him of the amount so illegally collected from plaintiff's agent, James M. Yeates, and that the said defendant refused and still refuses to return to the said plaintiff the amount so unlawfully collected, or any part thereof.

Wherefore, the said plaintiff, John Kelley, prays that he may have judgment against said defendant, Oliver F. Rhoads, for the sum of two hundred and fifty dollars ($250.00) and interest thereon from and after October 29th, A. D. 1895, to the date of payment, together with the costs of this suit.

VAN ORSDEL & BURDICK,
Attorneys for Plaintiff.

16 STATE OF WYOMING, } ss:
County of Laramie, }

C. W. Burdick, being of lawful age, and being first duly sworn according to law, upon his oath deposes and says, that he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the above and foregoing petition and knows the contents thereof, and that the facts therein stated are true, as he verily believes.

C. W. BURDICK.

Subscribed in my presence and sworn to before me this 5th day of March, A. D. 1896.

[SEAL.]

PAUL BAILEY,
Notary Public.

STATE OF WYOMING, } ss:
County of Laramie, }

In the District Court, First Judicial District.

JOHN KELLEY, Plaintiff, }
vs.
OLIVER F. RHOADS, Defendant. }

Answer.

17 Comes now the said defendant, Oliver F. Rhoads, and for answer to the petition of plaintiff herein:

1. Admits the allegations contained in the first paragraph thereof.

2. Admits the ownership and possession of the ten thousand head of sheep mentioned in the second paragraph by plaintiff and their presence in the State of Wyoming.

3. Denies each and all of the allegations in the third paragraph.

4. Denies each and all of the allegations contained in the fourth paragraph.

5. Denies each and all allegations contained in the fifth paragraph.

6. Denies each and all of the allegations contained in the sixth paragraph.

7. Denies each and all of the allegations in the seventh paragraph, except that this defendant demanded the payment of two hundred and fifty dollars as taxes upon and as account of said sheep for the year 1895.

8. Denies each and all allegations contained in the eighth paragraph.

9. Denies each and all of the allegations contained in the ninth paragraph except that there was paid to this defendant the sum of two hundred and fifty dollars claimed to be due the said county of Laramie as taxes upon said sheep.

10. Denies each and all allegations contained in the tenth paragraph.

11. Denies each and all allegations contained in the eleventh paragraph.

12. Denies each and all the allegations contained in the twelfth paragraph.

13. Denies each and all the allegations contained in the thirteenth paragraph.

14. Denies each and all the allegations contained in the fourteenth paragraph.

15. Denies each and all the allegations contained in the fifteenth paragraph.

16. Denies each and all the allegations contained in the sixteenth paragraph.

18 17. Denies each and all the allegations contained in the seventeenth paragraph.

18. Denies each and all the allegations contained in the eighteenth paragraph.

II.

And for a second and further defense defendant alleges that said sheep were driven into the State of Wyoming to graze, and that said sheep did graze upon the certain pasture lands in said county of Laramie and in various parts thereof, said sheep not being confined upon any particular route of travel but being held and grazed upon land wherever the quality of grass appeared to be best, regardless of fences, regular traveled roads, or any destination in view; and that while said sheep were grazing in said Laramie county, and on the 23rd day of October, A. D. 1895, this defendant proceeded to and did levy taxes upon the said sheep numbering ten thousand head, more or less, belonging to said plaintiff, said levy of taxes amounting to two hundred and fifty dollars, and said levy being for the last half of the then current year; that this defendant proceeded to and did collect from said plaintiff the said sum of two hundred and fifty dollars as taxes so levied upon said sheep and due accordingly; that said money was so paid voluntarily and

without protest by plaintiff to defendant in his official capacity and as the officer designated by law for the levy and collection of taxes in such cases.

Wherefore, plaintiff prays that he may go hence without day with his costs.

OLIVER F. RHOADS,
By his att'y, ROBERT W. BRECKONS.

19 STATE OF WYOMING, } ss:
County of Laramie, }

Robert W. Breckons, being duly sworn, upon his oath deposes and says: That he is the attorney for the defendant in the above-entitled cause; that he has read the foregoing answer, and knows the contents thereof, and that the statements therein made are true as he verily believes.

ROBERT W. BRECKONS.

Subscribed in my presence and sworn to before me this 29th day of December, A. D. 1898.

WM. R. BRYANT,
Clerk of the District Court.

[SEAL.]

STATE OF WYOMING, } ss:
County of Laramie, }

In the District Court.

JOHN KELLEY, Plaintiff,
vs.
OLIVER F. RHOADS, Defendant.

Reply.

Comes now the above-named plaintiff, and replying to the second defense set out in the answer of the defendant filed herein, denies each and every allegation in said second defense contained.

JOHN KELLEY,
By VAN ORSDEL & BURDICK,
Attorneys for Plaintiff.

20 STATE OF WYOMING, } ss:
County of Laramie, }

J. A. Van Orsdel being first duly sworn, upon his oath deposes and says that he is a member of the firm of Van Orsdel and Burdick, attorneys for the plaintiff in the above-entitled case; that he has read the foregoing reply and knows the contents thereof, and that the statements therein made are true as he verily believes.

J. A. VAN ORSDEL.

Subscribed in my presence and sworn to before me this 27th day of December, A. D. 1898.

MARY AMAN,
Notary Public.

[SEAL.]

STATE OF WYOMING, } ss:
County of Laramie, }

In the District Court, First Judicial District.

JOHN KELLEY, Plaintiff,
vs.
OLIVER F. RHOADS, Defendant.

Agreed Statement of Facts.

For the purposes of this cause, it is agreed between the plaintiff and defendant that the following facts are true, namely:

1. John Kelley is now and was at all times mentioned in the petition filed herein, a citizen and resident of the State of Kansas.

2. Oliver F. Rhoads was the duly elected, qualified and acting county assessor of the county of Laramie, State of Wyoming, from the 7th day of January, A. D. 1895, until the 4th day of January, A. D. 1897.

21 3. Plaintiff at all times mentioned in the petition herein was the owner of the sheep mentioned in said petition, and that said sheep on or about the 29th day of October, A. D. 1895, were in the county of Laramie, in charge of James M. Yeates, the agent of the plaintiff, who was driving and transporting said sheep through the State of Wyoming from the then Territory of Utah, to the State of Nebraska.

4. In driving said sheep in such manner it was the practice of the person in charge to permit them to spread out at times in the neighborhood of a quarter of a mile, and while so being driven the sheep were permitted to graze over land of that width. They were driven in some instances through large pastures, in other instances through the public domain, and in other instances through pastures enclosed by fences. While being driven from the western boundary of the State to Pine Bluffs Station, they were maintained by grazing along the route of travel.

5. Said sheep were duly returned by plaintiff for taxation and assessed by the assessor and collector of taxes for the year 1895 in the county of Juab, Territory of Utah.

6. On the 29th day of October, A. D. 1895, while the said herd of sheep were in charge of the agent of the plaintiff in the county of Laramie State of Wyoming, the defendant in company with S. J. Robb, deputy sheriff, of Laramie county, Wyoming, collected from said plaintiff's agent the sum of two hundred and fifty dollars, ($250.00), alleged to be taxes due for the current year 1895, and that before the collection of said tax, upon demand for the payment of the same by the said defendant, the plaintiff's agent refused to pay the same, whereupon the said defendant said to the agent of plaintiff that the said defendant could or would take enough sheep and sell them, and from the proceeds retain the said amount of two hundred and fifty dollars, ($250.00), with costs; whereupon the plaintiff's agent, to prevent the seizure and sale of plaintiff's property

and the damage that would thereby accrue to plaintiff, paid the said defendant the sum of two hundred and fifty dollars, ($250.00).

22 7. It was a fact and defendant had knowledge of the fact and was notified by plaintiff's agent that said herd of sheep was being driven across the State of Wyoming to Pine Bluffs Station for the purpose of shipment, and that the same were not brought into the State for the purpose of being maintained permanently therein.

8. At the time of the regular assessment of property for the purpose of taxation in the county of Laramie in the year 1895, plaintiff had no property of any kind whatever in the county of Laramie, or in the State of Wyoming.

9. At the time the assessment of property in the county of Laramie for the year 1895 was equalized by the board of equalization of the county of Laramie, plaintiff had no notice of the time or place of meeting of said board of equalization, or that any assessment had been made against him for any purpose whatever within the State of Wyoming or the county of Laramie.

10. At the time the taxes for the current year 1895 were regularly and legally levied in the said county of Laramie, plaintiff had no property whatever in the county of Laramie or State of Wyoming.

11. Plaintiff has demanded of defendant a return to him of the amount of tax so collected from plaintiff's agent, but defendant refused and still refuses to return to plaintiff the amount so collected.

12. The time consumed in driving said sheep from the western boundary of the State of Wyoming to Pine Bluffs Station, in Laramie county, was from six to eight weeks, and by the route followed the distance traveled was about five hundred miles.

13. The said taxes were assessed, levied and collected by the defendant without the action, authority or assistance of the board of county commissioners or of any other officer or officers of Laramie county.

14. The said property so owned by the plaintiff had not been regularly assessed in any other county of the State for that year, and no taxes had been paid thereon in any other county in the State.

23 15. That for the purpose of shipping said sheep it was not necessary that they should be driven into the State of Wyoming, and that the railroad over which they were shipped could be reached from the point where the sheep were first driven by traveling a less distance than was necessary to travel from the place where they were first driven to any point in the State of Wyoming.

16. That at the time the two hundred and fifty dollars was paid to the defendant, it was paid without any protest other than appears in the other paragraphs of this agreed statement of facts.

JOHN KELLEY,
By VAN ORSDEL AND BURDICK, *Att'ys.*
OLIVER F. RHOADS,
By his att'y, ROBERT W. BRECKONS.

On the 28th day of December, A. D. 1898, the same being one of the days of the regular November, A. D. 1898 term of said court, the following order was made:

"STATE OF WYOMING, } ss:
County of Laramie, }

In the District Court, First Judicial District.

JOHN KELLEY, Plaintiff,
vs.
OLIVER F. RHOADS, Defendant.

Order and Judgment.

24 The above cause coming on now to be heard, on the petition of the plaintiff, the answer of the defendant, and the agreed statement of facts herein, and the court having heard the arguments of counsel, and being fully advised in the premises:

It is ordered, adjudged and decreed, that the plaintiff herein take nothing by his action; that the said defendant, Oliver F. Rhoads, go hence without day, and recover of the said John Kelley his costs in this behalf expended, taxed at $1.60 to which order and judgment of the court the said plaintiff, by his attorneys, now and here excepts.

RICHARD H. SCOTT, *Judge.*"

In the Supreme Court of the State of Wyoming.

JOHN KELLEY, Plaintiff in Error,
vs.
OLIVER F. RHOADS, Defendant in Error.

And be it remembered that on the 24th day of April, A. D. 1900, being one of the regular days of the April 1900 term of the supreme court of Wyoming, the following proceedings, among others, were had in the said court and entered of record, to wit:

JOHN KELLEY, Plaintiff in Error,
vs.
OLIVER F. RHOADS, Defendant in Error. } Docket 2–322.

25 By consent of parties this cause is submitted for decision upon the briefs herein filed without oral argument, whereupon the court doth take the same under advisement, reserving its decision for further consideration.

And be it remembered that on the 28th day of February, A. D. 1901, being one of the regular days of the November 1900 term of the supreme court of Wyoming, the said court handed down and thereupon filed herein the following opinion in words and figures following, to wit:—

In the Supreme Court of the State of Wyoming, February 28th, 1901.

JOHN KELLEY, Plaintiff in Error,
vs.
OLIVER F. RHOADS, Defendant in Error.

Van Orsdel and Burdick, for plaintiff in error; H. Waldo Moore, attorney for defendant in error.

Opinion of the Court.

POTTER, *C. J.*.

The sole question in this case is whether certain sheep of plaintiff in error had obtained a situs in this State for the purpose of taxation. On October 29, 1895, the defendant in error, as assessor for the county of Laramie, collected from plaintiff in error the sum of $250. as taxes upon a herd of sheep, consisting of about 10,000 head, belonging to the plaintiff in error, and then in the county of Laramie, in this State. Alleging the tax to have been illegally collected, plaintiff in error brought this suit in the district court to recover the amount so collected from him. The tax complained of was assessed and collected by authority of the provisions of chapter 61, Laws 1895. That act is set out in full in our opinion in this case when the same was before us on reserved questions, and its validity upheld. 7 Wyo. 237, 51 Pac. 593, 39 L. R. A. 594. The cause was submitted to the district court upon an agreed statement of facts. Judgment was rendered for defendant, and plaintiff now brings the case here on error, assigning as error that the judgment is not sustained by the evidence and is contrary to law. The contention of the plaintiff in error is that the property taxed was the subject of interstate commerce, being in transit across this
26 State from Utah to Nebraska, and as such was not taxable under the laws of this State. It is insisted that the facts show that the sheep were not brought into this State to be grazed, but were merely in transit on hoof through the State, and that their maintenance by grazing while so engaged was but an incident of their transportation. When the case was here before, conceiving that the question whether or not the sheep were brought into the State for the purpose of being grazed was a mixed one of law and fact, we did not decide it, deeming a decision upon a question of fact improper upon reserved questions. We did, however, in our opinion, mention the considerations which should control a determination of the fact, if in controversy, whether in a particular case sheep were brought here for grazing purposes, although in transit through the State. We then said, "We do not dispute the proposition that an owner of live stock, if not otherwise disobedient to the law, and is observant of the police regulations of the State, has the right to transport them to market by driving on foot, as well as by rail. Strictly speaking, they will be in transit by the one method as much as by the other. If, however, the purpose of such owner is not alone that of transportation, but comprehends also that of grazing, and feeding

them upon the natural grasses which is their natural source of sustenance, not as a mere necessary incident of the travel, but as one of the purposes of such movement, they would not come within the rule which exempts personal property in transit from taxation. To determine the existence or non-existence of such a joint purpose, all the facts must be considered,—the course taken; the character of the territory grazed upon; the time employed; the subsequent method of intended shipment; the ordinary facilities for transportation by other means; the place selected for the commencement of the journey by rail, if that is in contemplation; possibly, the time of the year, and the eventual purpose of their shipment; the character of the live stock, and the manner in which said stock is customarily kept, maintained and grown; and, in general, every competent fact which will tend to explain the purpose in view."

27 The statement of facts, so far as material to this question, is as follows: "Plaintiff at all times mentioned in the petition herein was the owner of the sheep mentioned in said petition, and that said sheep on or about the 29th day of October, A. D. 1895, were in the county of Laramie, in charge of James M. Yeates, the agent of the plaintiff, who was driving and transporting said sheep through the State of Wyoming from the then Territory of Utah, to the State of Nebraska. In driving said sheep in such manner it was the practice of the person in charge to permit them to spread out at times in the neighborhood of a quarter of a mile, and while so being driven the sheep were permitted to graze over land of that width. They were driven in some instances through large pastures, in other instances through the public domain, and in other instances through pastures enclosed by fences. While being driven from the western boundary of the State to Pine Bluffs Station they were maintained by grazing along the route of travel. It was a fact, and defendant had knowledge of the fact, and was notified by plaintiff's agent, that said herd of sheep were being driven across the State of Wyoming to Pine Bluffs Station for the purpose of shipment, and that the same were not brought into the State for the purpose of being maintained permanently therein. The time consumed in driving said sheep from the western boundary of the State of Wyoming to Pine Bluffs Station, in Laramie county, was from six to eight weeks, and by the route followed the distance traveled was about five hundred miles. That for the purpose of shipping said sheep it was not necessary that they should be driven into the State of Wyoming, and that the railroad over which they were shipped could be reached from the point where the sheep were first driven by traveling a less distance than was necessary to travel from the place where they were first driven to any point in the State of Wyoming."

As was said in our former opinion, it is well settled that property engaged in interstate commerce, by being transported through
28 a State on its journey from one State to another, would not be liable to taxation in the State through which it was passing; and, if the sole purpose of the owner of live stock is to pass through the State on the way to eastern markets, such stock will not have

been brought here to be grazed. It is also true that, before personal property becomes subject to State taxation it must have become identified and incorporated with the general mass of property in the State. We held that, when live stock are brought into the State to graze, they are fully identified and incorporated with the other property of the State, and that, if that purpose is present, the length of time the property remains here is immaterial; that in such case no question of interstate commerce is involved which prevents the exercise by the State of its power of taxation. And we said, "We observe no distinction, in respect to the matter under consideration, between the case of a sheep-owner of Utah, or some other State, driving or bringing his sheep into this State for the purpose of and permitting them to graze here, and an owner of like property residing in this State who brings in from another State sheep for the same purpose." Adhering to the views expressed in our previous opinion, we quote further some observations then made respecting this character of property: "Live stock in this State is, in the greater part, maintained by feeding or grazing upon the natural grasses of the soil. In the case of some kinds of live stock, they are largely allowed to roam at will, but over territory more or less confined in extent. With sheep, the custom is to keep them in convenient flocks or herds, intrusted to herders, and to direct them from place to place, generally, as to a particular herd, in some certain locality, but covering in most cases a rather large and indeterminate territory. They are thus maintained until in proper condition for disposition, shipment, or other purposes of the owner. The only way in which such property becomes identified and incorporated with the other property of the State is by being turned at large or herded, to be maintained by grazing.

29 Whether the purpose is that they shall remain in the State permanently or not is not a determining factor. Such a purpose does not exist in the case of a greater proportion of all the live stock in the State. The object of a cattle-grower is to ship out of the State his cattle, as soon as they arrive at the proper age, size or condition. To some extent, that is also the purpose which the sheep-owner has in view. We do not understand that an ultimate design to transport sheep out of the State is at all inconsistent with a purpose of bringing them into the State to graze. The time of the contemplated shipment may be uncertain, or it may be extended for a considerable period into the future. Incidentally, no doubt, that intention should be taken into account; but we do not conceive it to be a conclusive circumstance in determining the situs of the property, or the purpose of its presence within the State. It is altogether clear that, in case of herd sheep in this country they must, according to custom, be maintained somewhere by grazing until the time fixed upon has arrived for starting them upon their journey to some final destination. It may well be that if it is not desired that they shall reach such destination before a certain time, and that in the meantime the necessity of allowing them to graze and obtain the benefits therefrom is recognized, places therefore may be selected by the owner which will subserve the latter pur-

pose, and at the same time facilitate their final transportation when the occasion therefor shall occur. Such property is migratory. They are almost constantly moving. The character of the natural grasses, and the effect thereon by the grazing of sheep, is such that such movement is necessary. They cannot be permitted to remain stationery and feed in the same place a very long period of time. Therefore, it follows that, as they must move, their course can be readily directed along the direction in which they are eventually to be taken. In such case the purpose of grazing is not inconsistent with the idea of a driving or transportation to some distant place. Nevertheless the mere fact that in such driving they are also permitted to graze upon the way will not determine, at all hazards, the character
30 of the purpose in bringing them into the State. Each case must, it would seem, depend upon its own facts. It will not do to say that in every case, because an owner brings his sheep into the State to drive them through it to some other jurisdiction for purpose of sale or otherwise, that they are therefore merely in transit, for the reason that such a course might be selected which would consume quite a time in getting out of the State, and at the same time the animals would be maintained by grazing the same as if kept in the State from which they came, or if they had originally been within this State, and all the benefits would be derived that would accrue in the absence of any such intended transportation. The sheep would thus be used here in the same and only manner in which during the same time they would be used anywhere. We are of the opinion, therefore, that in determining the purpose and the situs the course and method of travel is a proper subject and one of the elements for consideration."

It is not expressly agreed in this case that the sheep were brought into this State to graze, nor, on the other hand, that they were not here for that purpose. That ultimate, fact, then, was to be determined from the other facts and circumstances that were agreed to. The district court, following the rule previously laid down in the case, in holding the property taxable must have found that a part of the purpose of the owner in bringing his sheep into the State and transporting them through it was that they might graze here, and while in transit receive the benefits to be derived from the grazing of his animals upon our natural grasses. Is that finding justified by the agreed facts in the case. We are of the opinion that it is, and shall endeavor, as briefly as consistent with the importance of the question, to state the reasons that influence our conclusions.

The evidence is that the plaintiff " was driving and transporting his sheep through the State of Wyoming from the then Territory of Utah to the State of Nebraska;" and again, "Said herd of sheep
31 was being driven across the State of Wyoming to Pine Bluffs Station for the purpose of shipment." In all this there is nothing conclusively inconsistent with a purpose originally existing to bring the sheep into this State to graze, not as a mere incident of the transit, but as an independent object of their coming into the

State on foot, and of their movement. No doubt said independent purpose of grazing was connected with the intention to ultimately ship them by rail out of the State, and to so direct their course of travel while grazing that they would gradually pass through the State, and, at a time approximately anticipated, reach the contemplated point of shipment. The fact that it was not intended to maintain them permanently within the State was shown, in our former opinion, not to operate as a determining factor in the case. The distance traveled by the sheep during a period of six to eight weeks, while they were in the State, made a daily travel of about nine miles. It may be, as suggested by counsel, that this is the maximum distance which such animals can be safely driven for such a continuous period of time, when the manner in which they were maintained is considered. Nevertheless we believe it to be also true that sheep will for that or even a much longer period travel daily eight or ten miles, and possibly occasionally a few miles further than that, and, if allowed to graze, obtain all the sustenance they require. It is not uncommon for sheep in this region to move in a day, while grazing, five or six miles, in the absence of a definite destination, and although not in transit from one place to another. Sometimes, in the case of ordinary grazing of a herd of sheep, they will move a greater distance; and that is not unusual, we believe, if it is found necessary to go further to reach a supply of water. In trailing or driving sheep from place to place over a period of time more or less extended, it is not the custom to force them to any particular speed of travel. Those in charge confine their efforts to a mere direction of travel; keeping them headed in the desired direc-
32 tion, but permitting them to go slowly enough to eat of the natural grasses as they proceed. Under competent herders, sheep so driven will easily travel the daily distance covered by the sheep in question, and be well maintained at the same time by grazing along the route of travel, when conducted through the public domain and pastures, and over territory such as was traversed by the sheep of plaintiff in their journey through this State. In such case, then, sheep so traveling, while not brought into competition with other property of the State for the purpose of sale, perhaps, are in daily competition with all the live stock regularly maintained in the localities of the route of travel, in respect to the use of the natural grasses of the soil, incapable of reproduction in the same year. More than that, the effect of the grazing of sheep is such that it is a matter of common knowledge that a pasture over which they have been permitted to graze in large bunches or herds is rendered unfitted for the grazing of other classes of domestic live stock. Now the sheep of plaintiff did not follow in the course of their transit any public highway. They roamed over pastures, fenced and unfenced, and across the public domain, and were allowed to spread out a quarter of a mile in width. In other words, they were so directed, or herded that they might graze. The same railroad over which they were ultimately shipped could have been reached without coming into Wyoming at all, and that by being driven a less distance than was necessary to drive them to reach any point in

this State. This appears from the agreeds statement. We know judicially that between the western boundary of the State and Pine Bluffs Station, which is situated close to the Nebraska line, there were numerous stations at any one of which the sheep could, if desired, have been transferred to the railroad for shipment. It seems impossible to conceive that a part of the plaintiff's purpose was not the grazing of the sheep in this State. Indeed, we are inclined to view the facts as disclosing that purpose to have been the controlling one,
and that the method adopted for the movement of the sheep
33 was employed for the reason that the sheep could at the same
time be maintained in like manner as if they had been kept in Utah, and perhaps new pastures found, while keeping the owner's home ranges for other sheep or for another season or time of year.

Counsel for plaintiff in error suggest, indeed, that it is the custom of the trade to first put sheep in "feed lots" for varying periods before offering them for sale in open market, and that as the food used is corn, which is ready for consumption the latter part of October, in the corn-feeding States, of which Nebraska is one, the shipper plans to reach his destination about November 1st, partly on account of the availability of the grain at that time, and partly because driving at a later date would be difficult and hazardous on account of storms. They concede that those purposes could be as well accomplished by holding the sheep at the point of departure until a later date, and then shipping them through quickly by rail. But they state that such shipment a longer distance by rail would be much more expensive. The agreed facts are, however, silent as to the difference, if any, in the matter of expense between the two methods. Adopt the contention of counsel for plaintiff in error, which has been ably presented, and it would be possible for sheep-owners to keep their large herds moving from one State to another, and thus avoid taxation altogether; and such in many instances would, in our judgment, be the actual result. Thus the commerce clause of the Federal Constitution would operate as a mere cloak to permit an evasion of State taxation on the part of a large and growing class of personal property.

The conclusion we have reached we believe to rest upon sound reason, and upon principal to be sustained by the authorities cited and reviewed in our previous opinion, as well as by others to be
hereinafter referred to. When property is held for any other
34 purpose than that of continuing the shipment within a
reasonable time, it cannot be considered as in transit. Prentice & E. Com. Clause, 63; Oil Co. *v.* Combs, 96 Ind. 179; Myers *v.* Commissioners, 83 Md. 385, 35 Atl. 144, 34 L. R. A. 309; Lumber Co. *v.* Willetts, 118 Ill. 559, 9 N. E. 254; Rieman *v.* Shepard, 27 Ind. 288. The general rule is that when goods are held for any other purpose than for transportation, the transit has ceased. Prentice & E. Com. Clause 224. A State may tax all property which has a situs within its limits, regardless of the fact that it may have come from or is destined to another State. *Id.* 225. In the case of Lumber Co. *v.* Willetts, *supra*, the lumber company, having its

place of business at Burlington, Iowa, bought logs in Wisconsin and Minnesota, where they were rafted and towed down the Mississippi river to the company's mills. Some of the logs would be stopped on the way down the river at New Boston harbor, in Illinois, and left there until needed at the mills. In sustaining a tax assessed by New Boston upon the logs in the harbor at that town in May, 1885, the court, reaching the conclusion that the property was not in transit, said: "New Boston harbor, or Sturgeon bay as it is usually called, is only thirty miles up the river from Burlington. It is very accessible, and it seems plain that the company had selected the bay as a place of storage for its logs—a place where its property could be shipped and kept in safety until such time as it was needed at the mills in Burlington. Indeed, for all practical purposes, it may be said that the transit of the property ended at New Boston. * * * The property was, therefore, kept at New Boston on account of the profit of the owners to keep it there. The company made money by the transaction. * * * If, then, the company had this property located in our State, and it was here for profit, and it was so located as to claim the protection of our laws, the property, in our opinion, had a situs here, and was liable to taxation." Now, in the case at bar, the property was not
35 kept in storage, but it was used for a profit to the owner, and it was so located as to claim the protection of our laws. In our view of the agreed statement, it is doubtful if the transportation of the sheep could be considered as having commenced until their shipment at Pine Bluffs Station, under the rule laid down in Coe *v.* Errol, 115 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715, referred to in our former opinion. 7 Wyo. 263, 51 Pac. 593, 39 L. R. A. 594. We discover little distinction, if any, in respect to the matter under discussion, between storage in transit and grazing in transit. In Oil Co. *v.* Combs, *supra* the Indiana court conceding that property in transit through that State, and there only for the purpose of transportation, would not be subject to taxation, said: "Property within the State for the purpose of undergoing any part of the process of manufacture is here for more than a temporary purpose connected with its transportation. The situs of the property does not depend upon the extent of the work that is to be done upon it; for, if it is here to be put through any of the stages in the process of its manufacture, it is here for a purpose which legitimately subjects it to taxation." In that case the property consisted of staves which the plaintiff had contracted for to be delivered to it at Pittsburg, Pa.; but under the contract they were first to be delivered at the yards of plaintiff in Perry county, Ind., to receive a finishing touch called "bucking," and then to be shipped to plaintiff at Pittsburg. The court said further: "Property in this State for the purpose of being subjected to a process essential to its fitness for sale or use is situated here, no matter what may be its ultimate destination." It seems unnecessary to enlarge upon the applicability of the principle announced in the above-mentioned case to the question now before us. The property, of course, in the case at bar, was not here for any process in the way of manufacture; but the principle is

precisely the same, the difference existing in the character of the property. The sheep were here to be maintained while
36 *while* in transit to a shipping point, by feeding upon a valuable natural product of our soil, and which in itself furnishes the possibilities for the largest and most profitable industry of our State. It is of no consequence whatever that transportation on foot would be cheaper than by rail. Probably it would not be less expensive if the owner was obliged to follow the public highways and purchase feed for his sheep en route. The cheapness consists in the benefits to be derived from the grazing of the sheep. Taking into account the nature of the property and the customary method of its maintenance, and the principle would be the same whether the sheep were brought into the State and kept the same length of time in a single county, and then shipped by rail, or caused to traverse two or more counties or the entire State and then shipped; the purpose to graze them existing in either case. They are susceptible of grazing as much as necessary for a reasonable maintenance by the latter method as by the former. The same question in relation to cattle was before the supreme court of Oklahoma. Halff *v.* Green, 62 Pac. 816. It was said in that case: "The allegation in the petition that 'the cattle were brought into the reservation for the purpose of grazing the same in transit to market' is not sufficient to take these cattle out of the general rule.' See, also, Collins *v.* Green (Okl.) 62 Pac. 813; Lasater *v.* Green, *id.* 816; Russell *v.* Green, *id.* 817. In Russell *v.* Green the court say: "It is next contended that these cattle were what is known as 'through cattle;' that they were only stopped off in the Osage Indian reservation so that they could rest and recuperate; that they were to be shipped on to market after they were pastured a short time. This position is taken only for the purpose of evading the true spirit of the transient property act. The petition itself shows that the object and purpose of locating these cattle in the Osage Indian reservation was to graze them, and put them on the market some time during the summer or fall. In other words, the owners intended to fatten them on the grass in the reservation, and
37 then market them in the fall. These cattle were properly taxable and the owner cannot evade taxation by calling them 'through cattle.'" A similar question arose in Texas. The owners of certain cattle assessed in Texas sought to avoid the tax on the ground that the cattle were only passing through Texas en route from Oklahoma to Chicago. The cattle in question were brought from their accustomed range in Oklahoma Territory to some feeding pens of the owners at Bowie, in Montague county, Tex., to be fattened for market. They were first driven to Waggoner, Texas, and thence carried by rail to Bowie, under written contracts fixing Chicago as the place of their ultimate destination, consigned, however, to the owners themselves. The cattle were unloaded at Bowie and fed there for about 90 days, when they were carried to market under bills of lading naming Waggoner as the initial point. The court say: "We are not inclined to hold that cattle in Texas, while being fattened in the owners' pens for the outside markets, are too transient

to have a situs and to be taxable here. Indeed, fattening cattle for such markets has become, as grazing cattle has long been, a permanent as well as extensive and profitable pursuit of the Texas people. It is a local industry, and during the feeding season the cattle, from whatever source they may come, become an important part of the mass of personal property of the State, enjoying alike the protection of our laws, and subject to the common burden of taxation. * * * Still less are we inclined to hold that cattle so situated are exempt from local taxation in consequence of the commerce clause of the constitution. If it should be so held, then to what movable property in the States may not this ever-expanding clause be extended? The paper cloak of an adjustable through bill of lading, like these found in this record, may thus be easily made broad enough to cover from local taxation all the cattle of Texas, whether grazing in pastures or on the open range, or feeding in pens.

To the feeding-in-transit privilege need only be added the grazing-in-transit privilege, and all will be covered. If the owner
38 may be allowed ninety days for feeding, why may he not be allowed six months or a year or two for grazing? In both cases the cattle may be said, figuratively speaking, to be on their way to Chicago or other market, their ultimate destination, but not in the sense of interstate commerce or tax laws." Waggoner *v.* Whaley, 21 Tex. Civ. App. 1, 50 S. W. 153. See, also, Cattle Co. *v.* Williamson, (Okl.) 49 Pac. 937.

Upon the statement of facts, we think the district court was justified in finding that the sheep of plaintiff in error were brought into this State for the purpose of grazing, and thus had acquired a situs here for the purpose of taxation; and we are of the opinion that the tax in no sense interfered with the operation of the interstate-commerce clause of the Federal Constitution. Indeed, we are convinced that the facts admitted show that the manner in which the sheep in question were handled or cared for was practically the same as that employed by residents of the State interested in the sheep-growing industry, who submit to the revenue law of the State without question. The wild natural grasses of this State, in common with all the arid region of the West, do not grow in the same abundance as tame grass, nor furnish near the amount of feed per acre. This partially explains the reason for the necessity of the almost constant movement of sheep sustained by grazing, and renders more clear the reason for the average daily travel of a herd of sheep consisting of 10,000 head, as in the case at bar. The judgment will be affirmed.

Corn J. and Knight J. concur.

39 And be it remembered that on March 1st, A. D. 1901, being one of the regular days of the October, 1900 term of the supreme court of Wyoming, the following proceedings, among others, were had in said court and entered of record, to wit:

In the Supreme Court.

CHEYENNE, WYO., *Feb. 28th*, 1901.

JOHN KELLEY, Plaintiff in Error,
vs.
OLIVER F. RHOADS, Defendant in Error.

This cause having been heretofore taken under advisement, and the court being now fully advised in the premises, doth say and find, that there is no error in the proceedings of the district court of Laramie county in this cause; and thereupon it is ordered and adjudged that the judgment herein rendered by the said district court of Laramie county be and the same is in all respects affirmed, in accordance with the opinion this day filed herein.

It is further ordered that the costs of these proceedings in error be taxed against the plaintiff in error, and the court doth certify that there was reasonable cause for these proceedings in error.

To the ruling, order and decision of the court and the opinion herein rendered the plaintiff in error by counsel now and here excepts, and now gives notice of petition for rehearing and that this cause will be taken on error to the Supreme Court of the United States, and said plaintiff in error is now granted sixty days within which to reduce his exceptions to writing, and present them for allowance.

And be it remembered that on the 4th day of April, A. D. 1901, being one of the regular days of the November, A. D. 1900 term of the supreme court, Wyoming, the following proceedings, among others, were had in said court and entered of record, to wit:

In the Supreme Court of the State of Wyoming.

JOHN KELLEY, Plaintiff in Error,
vs.
OLIVER F. RHOADS, Defendant in Error.

Petition for Rehearing.

Comes now the plaintiff in error in the above-entitled case, and moves the court to grant a rehearing of this cause upon the following points, upon which the court erred in rendering its judgment and delivering its opinion on the 28th day of February, A. D 1901.

First. That under and by virtue of that portion of section 8, article 1 of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations, and among the several States and with the Indian tribes, the property of plaintiff in error in this case being in transit and being transported across the State of Wyoming from the then Territory of Utah to the State of Nebraska, was interstate commerce, and not subject to taxation in the State of Wyoming.

Second. That the property of plaintiff in error in this action was

not subject to taxation under the provisions of chapter 61 of
41 the Session Laws of the Year 1895, or any other statute of the State of Wyoming, for the reason that the said property was interstate commerce; that any attempt on the part of the authorities of the State, or any county thereof, to levy and collect taxes upon said property under any statute of Wyoming was and is in violation of the Constitution of the United States.

Third. That Congress had exclusive power to regulate commerce among the several States, and any attempt by the State of Wyoming, by legislation or otherwise, to tax or levy a burden upon the property of plaintiff in error herein is the exercise of a power reserved by the United States and not granted to the several States, and is, therefore, unconstitutional.

Fourth. In finding that the property of the plaintiff in error became identified and incorporated with the general mass of property in the State, and that said property obtained a situs therein.

Fifth. In finding that the controlling purpose of the plaintiff in error in bringing his sheep into Wyoming was for the purpose of grazing and not for the purpose of transportation.

Sixth. In finding that the property of plaintiff in error was not actually in transit until loaded on the cars at Pine Bluffs Station, Wyoming.

VAN ORSDEL AND BURDICK,
Attorneys for Plaintiff in Error.

JOHN KELLEY, Plaintiff in Error,
vs.
OLIVER F. RHOADS, Defendant in Error. } Docket 2, No. 322.

42 The petition for rehearing of the plaintiff in error in this cause having been heretofore filed is now considered by the court, the court being fully advised in the premises does now deny the same, to which the plaintiff in error, by counsel, now and here excepts.

And now the plaintiff in error presents to the court his bill of exceptions herein, and asks that the same be allowed in open court, to the allowance of which the defendant in error, by his counsel, now and here objects, and the court being fully advised in the premises, doth overrule the objection of the defendant in error, to which ruling the defendant in error now and here excepts, and the said bill of exceptions is now in open court allowed, signed and sealed, and ordered to be made a part of the record in this cause, but not to be spread upon the journal of this court.

43 In the Supreme Court of the State of Wyoming.

JOHN KELLEY, Plaintiff in Error,
vs.
OLIVER F. RHOADS, Defendant in Error.

I, Charles N. Potter, chief justice of the supreme court of the State of Wyoming, do hereby certify that this is a suit in which the

plaintiff in error specially claimed and set up a right, privilege, exemption and immunity under and by virtue of section 8, article 1 of the Constitution of the United States, and the judgment and decision herein rendered by the supreme court of the State of Wyoming was against said right, privilege, exemption and immunity set up and claimed by said plaintiff in error under said section of the Constitution of the United States, and that the right, privilege, exemption and immunity claimed and set up by the plaintiff in error was the exemption from taxation by the State of Wyoming of certain sheep belonging to plaintiff in error, while the same were being driven and transported by plaintiff in error through the State of Wyoming from the then Territory of Utah to the State of Nebraska by virtue of and under the provisions of section 8, article 1 of the Constitution of the United States, which provides, "Congress shall have power * * * to regulate commerce with foreign nations and among the several States and with the Indian tribes," and the decision of the said supreme court of the State of Wyoming was against the right, privilege, exemption and immunity so claimed by plaintiff in error.

CHARLES N. POTTER,
Chief Justice of the Supreme Court of the State of Wyoming.

44 [Endorsed:] In the Supreme Court of the United States. John Kelley, pl'ff in error, *vs.* Oliver F. Roades, def*f.* in error. Portions of record to be printed.

45 [Endorsed:] File No. 18,145. Supreme Court U. S. October term, 1901. Term No. 315. John Kelley, pl'ff in error, *vs.* Oliver F. Rhoads. Agreed record. Filed Jan'y 31st, 1902.